State of Michigan

In the Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNESTO EVARISTO URIBE,

Defendant-Appellant.

Supreme Court No. 151899

Court of Appeals No. 321012

Trial Court No. 13-020404-FC

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Plaintiff-Appellee's Brief Opposing Defendant-Appellant's Application for Leave to Appeal

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Plaintiff-Appellee does not dispute that the Michigan Supreme Court has jurisdiction to review Ernesto Uribe's application.

Counter-Statement of Questions Presented

Issue I

> LEAVE TO APPEAL TO THE SUPREME COURT REQUIRES SUFFICIENT GROUNDS. URIBE CLAIMS, AS GROUNDS, THAT THE COURT OF APPEALS CLEARLY ERRED, **AND** THAT THE DECISION CONFLICTS WITH *WATKINS*. URIBE ARGUES THAT JU DID NOT DESCRIBE A "LISTED OFFENSE," BUT NEVER ARGUES HOW THE DECISION CONFLICTS WITH *WATKINS*. THE COURT OF APPEALS DECISION, DOES NOT CONFLICT WITH *WATKINS*. HAS URIBE ESTABLISHED SUFFICIENT GROUNDS TO BE GRANTED LEAVE TO APPEAL?"
>
> Defendant-Appellant Answer: "Yes."
>
> Plaintiff-Appellee Answer: "No."

Issue II

> LEAVE TO APPEAL TO THE SUPREME COURT REQUIRES SUFFICIENT GROUNDS. URIBE CLAIMS, AS GROUNDS, THAT THE COURT OF APPEALS CLEARLY ERRED, AND THAT THE DECISION CONFLICTS WITH *WATKINS*. URIBE CLAIMS THE COURT OF APPEALS ERRED BY RULING THAT JUDGE

CUNNINGHAM FAILED TO CONDUCT A PROPER MRE 403 ANALYSIS, AND OVERSTEPPED HER AUTHORITY BY MAKING A CREDIBILITY DETERMINATION. RATHER THAN DETERMINE ADMISSIBILITY SUBJECT TO MRE 403, JUDGE CUNNINGHAM ACTUALLY CONDUCTED AN MRE 404(B) ANALYSIS – PROHIBITED BY *WATKINS*. JUDGE CUNNINGHAM ALSO, IMPROPERLY, MADE A CREDIBILITY DETERMINATION OF JU – DECIDING THAT JU WAS LYING AFTER HER INITIAL DENIAL OF ABUSE BY URIBE. HAS URIBE ESTABLISHED SUFFICIENT GROUNDS TO BE GRANTED LEAVE TO APPEAL?

Defendant-Appellant Answer: "Yes."

Plaintiff-Appellee Answer: "No."

Counter-Statement of Facts

Ernesto Uribe is charged with five counts of Criminal Sexual Conduct in the 1st degree.[1] The victim is Uribe's ex-girlfriend's daughter, VG. Uribe and VG's mother, Cathleen, lived together from the time VG was approximately 2-years-old until she was 9-years-old. Uribe and Cathleen have two children together, JU and MU.

VG's Sexual Abuse

VG testified at the preliminary exam that she remembers being sexually abused by Uribe five times. One of the occasions took place when she was in third grade and living at Courtland Drive. VG testified that prior to being sexually abused, she was sleeping in her bedroom. She woke to the Uribe getting into her bed. Once Uribe got into bed, he pulled down her pants and stuck his penis in her "butt." VG noted that this time was different than any of the other times, because Uribe wore a condom.[2]

The last time VG remembers being sexually abused, she was in fourth grade and living in Kensington Meadows. During the night, VG had wet her bed and her mom had cleaned her up, and put VG in her and Uribe's bed to sleep. When VG woke-up, her mom had left for work and Uribe had gotten out of bed and gone into the bathroom. VG testified she was almost back to sleep, when Uribe came back to the bed, pulled her pants down, and put his penis in her "butt." This sexual abuse

[1] Information, January 8, 2014.
[2] Preliminary Examination Transcript, December 13, 2013, at 19-24.

ended when VG was 9 years-old, and Uribe no longer lived with her.[3]

Uribe's Parental Rights Are Terminated

A termination trial of Uribe's rights to JU and MU was held on October 8, 2013. At the end of the trial, Judge Thomas K. Byerley found by clear and convincing evidence that VG had been sexually abused by Uribe. Judge Byerley found that MCL 712A.19(b)(3)(b)(i) had been met by clear and convincing evidence, and it was in the children's best interest to have Uribe's parental rights terminated. Uribe had been allowed supervised visitation with JU and MU on a weekly basis, since the initial petition was filed in November 2012. Uribe's supervised visits were discontinued at the time of termination. JU disclosed sexual abuse by Uribe, 12-days later, on October 20, 2013.

JU told her Aunt, MU, VG, then her mother. Cathleen called the police and JU was interviewed by Trooper Beimers of the Michigan State Police.

The People filed a notice under MCL 768.27a, intending to call JU at the trial to testify regarding the sexual abuse she suffered. The People attached the MSP report with the summary of JU's interview as notice of JU's testimony.[4]

JU's Sexual Abuse

In her interview with Trooper Beimers, JU stated that she had fallen asleep in Uribe's bed while watching a movie. At some point in the middle of the night, she woke to Uribe putting his hand down her pants and underwear. She also stated

[3] *Id.*, at 24-28.
[4] Notice Pursuant to MCL 768.27a, with attached Michigan State Police, Incident Report 011-0004428-13, October 23, 2013; Exhibit A.

that the defendant kept trying to make her touch his privates. She did not know which way to lay, because no matter what way, he would touch her, or try to make her touch him.

When asked to clarify what she meant by "privates," JU stated "my down area, like my crotch and my dad, I think his, um, penis." When asked where exactly he touched, she replied, "Just the top. He was in my underwear."[5]

JU further disclosed that the defendant attempted to force JU to touch him and that she pretended to stretch to move her hand away. She stated that she never actually touched him.

Procedural History for MCL 768.27a Offered Testimony

Over a month prior to the trial, the People filed a Notice Pursuant to MCL 768.27a, along with a Michigan State Police incident report, related to an allegation of sexual touching by Uribe, with one of his biological daughters, JU.[6] About 3-weeks later, the People received Defendant's Objection and Motion to Suppress Testimony the People Intend to Introduce Pursuant to MCL 768.27a.[7] In response, the People filed a Reply to Defendant's Objection and Motion to Suppress, and argued at the hearing set a week-and-a-business-day before trial.[8]

[5] *Id.*, at 4; Exhibit A.
[6] *Id.*; Exhibit A.
[7] Defendant's Objection and Motion to Suppress Testimony the People Intend to Introduce Pursuant to MCL 768.27a.
[8] Reply to Defendant's Objection and Motion to Suppress.

Judge Cunningham Denies Admission of MCL 768.27a Testimony[9]

At the hearing on Uribe's motion to suppress, Judge Janice Cunningham first stated that the proffered testimony did not constitute a Criminal Sexual Conduct, second degree, and that Uribe's described behavior did not satisfy the requirement that a tier III offense had been committed.

Judge Cunningham then gave the Prosecutor the "benefit of the doubt," and analyzed the proffered testimony under *Watkins* factors. Judge Cunningham denied the admission of the testimony, stating that acts described by JU, and VG, were "not even close." While recognizing that the offered acts do not have to be identical, Judge Cunningham determined that there was "extreme differences in allegations."

Judge Cunningham was concerned by the infrequency of JU's abuse; and since there were no witnesses, Judge Cunningham determined that the testimony lacked reliability.

During the Motion to Stay Proceedings, heard the following Monday, Judge Cunningham conceded that the offered testimony was not cumulative, and was important to the People's case to show propensity.[10]

The People Appeal

Following Judge Cunningham's ruling, the People filed, and was granted,

[9] Order, Denying MCL 768.27a Evidence, March 24, 2014; Motions Transcript, March 21, 2014, at 18-22.
[10] Order, Granting Stay of Proceedings, March 24, 2014.

application for leave to appeal, by the Court of Appeals.[11] The People argued that Judge Cunningham abused her discretion by denying admission of JU's testimony under MCL 768.27a. This was because Judge Cunningham improperly found that Uribe's described behavior was not a "listed offense," and Judge Cunningham failed to properly apply MRE 403 as required by *People v Watkins*.[12]

Court of Appeals Decision

In a unanimous, published decision; the Court of Appeals reversed Judge Cunningham, finding three errors:

1. It was improper for Judge Cunningham to make a credibility determination – excluding JU's testimony;

2. Judge Cunningham made an error of law when she found that JU's statements did not describe a "listed offense;" and

3. Judge Cunningham abused her discretion when she improperly applied the balancing test in MRE 403 – to excluded JU's testimony.

As a result, Justices Saad, Owens, and Kelly remanded the case to Judge Cunningham with the directive that she enter an order permitting the admission of JU's MCL 768.27a-testimony.[13]

Uribe's Application

In response to the decision, Uribe requests leave to appeal based on two claims. First, that the Court of Appeals erred in reversing Judge Cunningham's

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[11] Court of Appeals Order, July 16, 2014.
[12] Plaintiff-Appellant's Emergency Application for Leave to Appeal, March 25, 2014; Plaintiff-Appellant's Brief on Appeal, October 24, 2014; *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012).
[13] *People v Uribe*, ___ Mich App ___; ___ NW2d ___ (2015).

finding that the proposed testimony did not involve a "listed offense." Second, that the Court of Appeals erred by finding that Judge Cunningham improperly applied the balancing test in MRE 403 – excluding JU's testimony under MCL 768.27a.

In making this request, Uribe fails to address the necessary grounds to support an application for leave to appeal to the Supreme Court. Rather, Uribe merely submits the same arguments it made to the Court of Appeals, with hopes that this Court will keep JU from telling the jury of his behavior that supports a propensity for the sexual molestation and abuse of children. Uribe's application must be denied.

People v Watkins[14]

In *People v Watkins*, the Court considered the combined cases of Lincoln Watkins, and Richard Pullen, to interpret MCL 768.27a.

Lincoln Watkins

Watkins was convicted of four counts of CSC 1st, and one count of CSC 2nd, for raping and molesting a 12-year-old friend-of-the-family, and babysitter. At trial, a former friend-of-the-family, and babysitter, testified that when she was 15-years-old, Watkins raped her. The earlier allegation was never reported, and Watkins was never convicted. However, both victims indicated that the instances of abuse happened over a long-period of time, and both believed they were in a relationship with Watkins.[15]

On appeal, the Court considered:

[14] *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012).
[15] *Id.*, at 456-461.

1. whether there was a conflict between MCL 768.27a, and MRE 404(b),

2. if so, which controls,

3. whether MCL 768.27a is subject to the balancing test of MRE 403, an

4. whether MCL 768.27a conflicts with a due process right to a fair trial.[16]

This Court affirmed Watkins' convictions, finding that:

1. there is a conflict between MCL 768.27a, and MRE 404(b),

2. since the statute addresses a policy consideration extending beyond the "orderly dispatch of judicial business," the statute controls over the court rule,

3. MCL 768.27a is subject to the balancing test of MRE 403, with propensity being weighed in favor of admission, and

4. The Court declined to address the fourth issue, because of its ruling on the third issue.[17]

Richard Pullen

Pullen was charged with two counts of CSC 2nd, and one count of Aggravated Indecent Exposure. He was accused of sexually molesting, and exposing himself to, his 12-year-old granddaughter. The prosecutor wanted to admit a 20-year-old police report, under MCL 768.27a – alleging that Pullen had sexually abused his then 16-year-old daughter through digital penetration, improper sexual touching, and by exposing himself to her. Although Pullen had been interviewed, and admitted to some of the acts of molestation, he was never convicted of this abuse.[18]

The trial court excluded the evidence under MRE 403, because it was "highly

[16] *Id.*, at 463.
[17] *Id.*, at 490-491.
[18] *Id.*, at 463-464.

probable that the jury would not be able to separate the two cases and would likely decide the case based on emotional impact rather than logical reason."[19]

The Prosecutor appealed, and the Court of Appeals affirmed, stating that the trial court was correct in determining that the jury would likely convict Pullen based on this past conduct.[20]

On appeal, the Court considered:

1. does the construction of MCL 768.27a prevent an MRE 403 balancing test, and
2. is MCL 768.27a evidence subject to MRE 403.[21]

This Court remanded to the trial court, and found that:

1. the trial court erred by failing to weigh the propensity inference in favor of admission,
2. the trial court failed to consider how the propensity evidence supported the victim's credibility, in favor of admission,
3. the trial court failed to consider each alleged MCL 768.27a-act separately, but that such error was harmless, and
4. indecent exposure is not a "listed offense."[22]

Supreme Court's Decision

In deciding these combined cases, the Court held that evidence under MCL 768.27a may not be excluded under MRE 404(b), but that admission was subject to MRE 403 – with any propensity inference being weighed in favor of admission.[23]

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[19] *Id.*, at 465.
[20] *Id.*, at 465-466.
[21] *Id.*, at 466.
[22] *Id.*, at 491-496.
[23] *Id.*, at 496.

Law and Argument

Counter-Statement of Standard of Review

An application for leave to appeal to the Michigan Supreme Court may only be granted for limited reasons. Uribe asks this Court to grant his application based on the assertion that the Court of Appeals decision "is clearly erroneous and . . . conflicts with a Supreme Court decision."[24] Uribe asserts that the Court of Appeals decision conflicts with the Court's decision in *People v Watkins*.[25]

A decision is clearly erroneous if this Court is left with a "definite and firm conviction that a mistake has been made."[26] This Court may only grant leave to appeal if it finds the Court of Appeals decision was *definitely* in error, **and** the decision conflicts with *People v Watkins*.[27]

ISSUE I

> LEAVE TO APPEAL TO THE SUPREME COURT REQUIRES SUFFICIENT GROUNDS. URIBE CLAIMS, AS GROUNDS, THAT THE COURT OF APPEALS CLEARLY ERRED, **AND** THAT THE DECISION CONFLICTS WITH *WATKINS*. URIBE ARGUES THAT JU DID NOT DESCRIBE A "LISTED OFFENSE," BUT NEVER ARGUES HOW THE DECISION CONFLICTS WITH *WATKINS*. THE COURT OF APPEALS DECISION, DOES NOT CONFLICT WITH *WATKINS*. HAS URIBE ESTABLISHED SUFFICIENT GROUNDS TO BE GRANTED LEAVE TO APPEAL?

Prosecutor's answer: "No."

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[24] MCR 7.302(B)(5).
[25] *Watkins*, *supra* 14.
[26] *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008); *Radloff v State*, 136 Mich App 457, 459; 356 NW2d 31 (1984).
[27] *Watkins*, *supra* 14.

Uribe's First Claim

In his first issue, Uribe claims that the JU did not describe a "listed offense" in the proffered testimony, and it was error for the Court of Appeals to find, as a matter of law, that JU described a "listed offense." To support this argument, Uribe re-states the same argument he made to the Court of Appeals.

"The Supreme Court's authority to hear cases is discretionary. The Court grants leave to those cases of greatest complexity and public import, where additional briefing and oral argument are essential to reaching a just outcome."[28] To be granted leave to appeal to the Supreme Court, an applicant, as moving party, must establish that there are sufficient grounds for the Court to consider his claims of error. Uribe claims as his grounds that the Court of Appeals decision is "clearly erroneous," **and** conflicts with the Court's decision in *People v Watkins*.[29]

Uribe Forfeits Claim

However, Uribe fails to argue that there are sufficient grounds to be granted leave to appeal, because he does not address how the Court of Appeal's decision conflicts with the Supreme Court's holdings in *Watkins*.

> An appellant may not merely announce his position and leave it to the Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.[30]

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[28] Michigan Supreme Court, About the Court, <http://courts.mi.gov/courts/michigansupremecourt/about-supreme-court/pages/default.aspx> (accessed July 15, 2015).
[29] MCR 7.302(B)(5).
[30] *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998); *citing Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

By failing to make the argument, Uribe has forfeited that the Court of Appeals decision conflicts with *Watkins*. Based on his application, Uribe has not met his burden and this Court should not grant leave.

Court of Appeals Decision Does Not Conflict

Ignoring Uribe's forfeiture, the finding that JU described a "listed offense," does not conflict with *Watkins*.

Whether or not there was a "listed offense," was only in dispute in the Pullen-portion of the case. In the police report, offered under MCL 768.27a, there was a description of Pullen exposing himself to his daughter. The *Watkins*-Court ruled that portion of the police report involving the exposure was not eligible for admission under MCL 768.27a, and must be analyzed for admissibility under MRE 404(b).[31] This is because MCL 768.27a applies only to Sex Offender Registration Act-tier I, II, or III-offenses.[32]

The Court of Appeals' finding is correct, and the People rely on its previous argument the People's Court of Appeal-brief, which is part of the record. However, even if wrong, the Court of Appeals' decision that JU did described a "listed offense," does not conflict with *Watkins*. It does not advocate the admission of non-tier I, II, or III offense-evidence through MCL 768.27a; or that non-"listed offenses" should be only analyzed for admission under MRE 403 – ignoring the requirements of MRE 404(b).

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[31] *Watkins*, *supra* 14, at 494.
[32] *Id.*, at 469; MCL 768.27a; MCL 28.722(j), (s), (u), and (w).

The Court of Appeals' finding does not undermine, or contradict, *Watkins*. Choosing to deny leave will not cause confusion in the application of *Watkins*, or raise any questions of validity in the lower courts. It does not present this Court with a complex issue, or an issue of great public concern, requiring review to ensure consistency of application across the state.

Conclusion

Since Uribe has failed to argue sufficient grounds for leave to appeal, based on the Court of Appeal's finding that JU described a "listed offense," the application must be DENIED.

Issue II

> LEAVE TO APPEAL TO THE SUPREME COURT REQUIRES SUFFICIENT GROUNDS. URIBE CLAIMS, AS GROUNDS, THAT THE COURT OF APPEALS CLEARLY ERRED, AND THAT THE DECISION CONFLICTS WITH *WATKINS*. URIBE CLAIMS THE COURT OF APPEALS ERRED BY RULING THAT JUDGE CUNNINGHAM FAILED TO CONDUCT A PROPER MRE 403 ANALYSIS, AND OVERSTEPPED HER AUTHORITY BY MAKING A CREDIBILITY DETERMINATION. RATHER THAN DETERMINE ADMISSIBILITY SUBJECT TO MRE 403, JUDGE CUNNINGHAM ACTUALLY CONDUCTED AN MRE 404(B) ANALYSIS – PROHIBITED BY *WATKINS*. JUDGE CUNNINGHAM ALSO, IMPROPERLY, MADE A CREDIBILITY DETERMINATION OF JU – DECIDING THAT JU WAS LYING AFTER HER INITIAL DENIAL OF ABUSE BY URIBE. HAS URIBE ESTABLISHED SUFFICIENT GROUNDS TO BE GRANTED LEAVE TO APPEAL?
>
> **Prosecutor's answer: "No."**

MCR 404(b)

MCR 404(b) prohibits the admission of propensity evidence, but permits

other-act-evidence be admitted for a narrow list of purposes. While preventing evidence that suggests it is in the nature of the person to commit a crime,[33] MCR 404(b) permits evidence to explain to the jury things like, the defendant's motive, that he had an opportunity to commit the crime, to support intent, to show preparation, that he has a set scheme or plan when committing crimes, his identity, or absence of mistake or accident.[34] To support admission, the trial judge must find that the acts are significantly-similar to show a conformity supporting the assertion that the actions demonstrate a common intent, or repetitious plan, or scheme.

MCL 768.27a

In contrast, MCL 768.27a permits evidence be admitted for the purpose of showing defendant has a propensity to commit sexual crimes against minor children. This statute represents an effort by the legislature to protect children from sexual predators.[35]

MCL 768.27a Supersedes MCR 404(b)

This Court, in *Watkins*, ruled that MCL 768.27a directly conflicts with MCR 404(b), and the statute supersedes the court rule.[36] However, MCL 768.27a-evidence is still subject to limitation under MCR 403.[37]

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[33] Propensity is defined as: "a strong natural tendency to do something." Propensity, Merriam-Webster <www.merriam-webster.com/dictionary/propensity. (accessed September 23, 2015); "a natural inclination or tendency." Propensity, Dictionary.com <dictionary.referecne.com/browse/propensity> (accessed September 23, 2015).
[34] MCR 404(b)(1).
[35] *Watkins*, *supra* 14, at 475-476.
[36] *Id.*, at 467-481.
[37] *Id.*, at 481-486.

MCR 403

MCR 403 is a broad rule that exists to prevent the admission of "unfairly prejudicial" evidence, creating a "danger that marginally probative evidence will be given undue or preemptive weight by the jury."[38] It permits the exclusion of relevant evidence when the "probative value is *substantially* outweighed by the danger of unfair prejudice . . ."[39]

This does not mean that a trial judge may exclude "damaging," or merely "prejudicial" evidence.[40] It is the nature of evidence that it is inherently prejudicial, otherwise it would not be relevant and of benefit to the jury.[41] The distinction is that MCR 403 prevents admission of "unfairly prejudicial" evidence.[42]

Judge Cunningham's Ruling

While Judge Cunningham stated that she was excluding JU's testimony under MRE 403, she actually completed an MRE 404(b) analysis to support the exclusion. In conducting this analysis, Judge Cunningham abused her discretion in two ways. First, she analyzed the admissibility of JU's testimony under the wrong standard. Second, she overstepped her authority and made a credibility determination.

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[38] *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003); *quoting Waknin v Chamberlain*, 467 Mich 329, 334 n 3; 653 NW2d 176 (2002); *quoting People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).
[39] MRE 403; emphasis added.
[40] *Lewis*, *supra* 38, at 199.
[41] *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).
[42] *Lewis*, *supra* 38, at 199.

MRE 404(b) Analysis

MRE 404(b) permits other acts evidence when the crimes are so similar that they can be shown to be a common plan or scheme. Judge Cunningham's extensive reliance on the "dissimilarity" of Uribe's acts of sexual abuse of VG, and JU, demonstrates her desire to conduct an MRE 404(b) analysis, while ensuring propensity evidence be excluded in spite of MCL 768.27a.

Much of Judge Cunningham's decision is a determination that Uribe's acts of sexual abuse is so drastically different, that it is prejudicial to Uribe.[43] However, the decision ignores other *Watkins* factors that explain differences.[44] Focusing on her "dissimilar"-finding, Judge Cunningham indicates that JU's testimony would not assist the jury in finding that Uribe has a propensity to sexually-abuse children.[45]

Same Acts Not Required

MCL 768.27a does not require the same sexual acts be committed, to establish a propensity for molestation of minor children. In fact, even instances of abuse of a different gender may be admitted to demonstrate a broad propensity to abuse children.[46] However, Judge Cunningham heavily-relied on a determination that Uribe's sexual abuse of VG was "so dissimilar from what we have here [, JU's offered testimony,] that I find it would be, I think it would be prejudicial to the

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[43] Motions Transcript, at 22.
[44] Plaintiff-Appellant's Brief on Appeal, COA No. 321012, October 24, 2014, at 14-16.
[45] *Id*.
[46] *People v Long*, unpublished opinion per curiam of the Court of Appeals, issued September 14, 2010 (Docket No. 293586), at 12; Exhibit B; *People v Quick*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2012 (Docket No. 306030); Exhibit C.

defendant."

MCL 768.27a's Purpose Differs from MCR 404(b)

While MCR 404(b) relies on similarity to demonstrate a pattern of behavior that the jury may use to determine intent, or motive; MCL 768.27a is a rule of inclusion, intended to permit the jury to receive propensity evidence, whether or not the child-molester – not contingent on a consistent pattern of behavior. That is why "similarity" is merely one suggested factor discussed in *Watkins*. Judge Cunningham's error lies in her complete reliance on the level of similarity between the sexual allegations, and her failure to consider other factors.

Rather than use "similarity" as part of her determination of the value of the evidence to the jury, Judge Cunningham looked for repetition as a litmus test for admissibility, stating:

> I think the purpose of this legislation honestly is to allow in other allegations that are more similar in nature to show a propensity; see, this is what the defendant does, this is what the defendant does.[47]

The actual purpose of MCL 768.27a is to permit the admission of propensity evidence as a way to protect the most vulnerable victims in our society. It is not merely an opportunity to demonstrate a common plan, or scheme; to prove intent; or even identity through a pattern of actions. Such evidence is admissible under MRE 404(b). If this strained analysis was permitted to be used by trial judges, it would make MCL 768.27a a set of hollow words – circumventing the intent of the legislature.

[47] Motions Transcript, at 21-22; *emphasis added*.

Judge Cunningham's Standard for Exclusion

Further evidence that Judge Cunningham conducted an MRE 404(b) analysis, is the standard of review she used. While MRE 403 permits the exclusion of relevant evidence when the "probative value is **substantially** outweighed by the danger of unfair prejudice . . ."[48]; Judge Cunningham articulated a different standard in making her ruling.

> The extreme differences between the two allegations and the fact that with the victim this occurred multiple times, with the proposed witness it only happened one time, causes concern. Also the lack of reliable evidence supporting the fact that it occurred is a concern. **Those concerns**, in the court's opinion, **tip the scale towards the defendant's issue of it being prejudicial** because it is so dissimilar.[49]

Judge Cunningham's "tipping-of-the-scale" standard is merely an assessment that the evidence is prejudicial, or harmful, to Uribe; not "unfairly," or "substantially," prejudicial – as required by MRE 403.

Judge Cunningham did not conduct an MRE 403 analysis, to determine if the "probative value is **substantially** outweighed by the danger of unfair prejudice . . ."[50] But instead, she narrowed the analysis to decide whether the sexual acts were similar enough to permit other acts evidence.

Conclusion

While Judge Cunningham asserted that she was conducting an MRE 403 analysis, her statement regarding "tipping-the-scale" to the Uribe's side,

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[48] MRE 403; *emphasis added*.
[49] Motions Transcript, at 21; *emphasis added*.
[50] MRE 403; *emphasis added*.

demonstrates a choice not to use a different standard to denying admission of relevant propensity evidence.

Since this Court has ruled that trial courts may not use MRE 404(b) to limit testimony offered under MCL 768.27a, Judge Cunningham's ruling improperly applied the wrong standard. It was not clear error for the Court of Appeals to reverse.

Judge Cunningham Oversteps Authority

In conducting her analysis, Judge Cunningham abused her discretion by over-stepping her authority – making a credibility determination based on the fact that JU initially denied abuse by Uribe.

In excluding the admission of the propensity evidence, Judge Cunningham stated

> The court has many concerns about the allegations as it relates to [JU]. I, I, it's concerning that **there was a initial statement, very clear nothing happened**. And even reading the statements that were done more recently – **her statements I think are all over the place**. I don't think it is at all clear about the touching as the prosecutor indicates. I think it's more clear that if anything happened she's been consistent that the hand was on the belly and that the fingers maybe dropped below the belly button.[51]

Later, Judge Cunningham stated, "the lack of reliable evidence supporting the fact that it occurred is a concern."[52]

These statements demonstrate that in conducting the *Watkins*-analysis, Judge Cunningham overstepped her authority to make a reliability determination,

[51] Motion Transcript, at 19; *emphasis added*.
[52] *Id*., at 21.

and rather acted as a juror making a credibility determination of JU.

***Watkins* Analysis**

Watkins provides several factors for a trial judge to consider when admitting MCL 768.27a-evidence. One factor is "the lack of reliability of the evidence supporting the occurrence of the other acts."[53] This is not a witness credibility determination, but instead a much broader determination to see if the evidence offered to support the propensity-evidence is reliable.

Judge Cunningham abused her discretion by conducting a credibility determination, rather than assessing the reliability of the proffered testimony.

Credibility Reserved for Jury to Determine

It is well-established that "issues of credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'"[54] Even "when testimony is in direct conflict and testimony supporting the verdict has been impeached, if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury."[55] As explained by this Court,

> **Criminal cases are usually fought on the battlefield of witness credibility, and this is particularly true in situations involving the credibility of a victim of a CSC crime where the only witnesses present are the victim and the perpetrator**, with the credibility of a professed accomplice to an unwitnessed crime, or

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[53] *Watkins*, *supra* 14, at 487.
[54] *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *quoting Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963).
[55] *Lemmon*, *supra* 54, at 643.

> the credibility of a coconspirator to a conspiracy, which, by its very nature, is a clandestine offense often know [sic] only to its members. **It is a well established rule that a jury may convict on the uncorroborated evidence of a CSC victim**; a professed accomplice; or in federal court on the uncorroborated testimony of a coconspirator. **Jury decisions in these cases are essentially based on the jury's assessment of the witnesses' credibility.** In general, **the trial courts "'must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses,'"** and only where exceptional circumstances can be demonstrated may the trial judge "intrude upon the jury foundation of credibility assessment."[56]

Trial judge's are permitted to nullify a jury's credibility determination only in extreme cases, For example, when witness testimony contradicts undisputed physical evidence; the testimony is physically impossible; or the testimony is so implausible, that it could not be believed by a reasonable juror.[57] Questions of fact are also left for a jury to decide, except in rare cases of possible government intrusion.[58]

Judge Cunningham abused her discretion by denying JU's testimony, based on a credibility-determination leading to her decision that the molestation never occurred. Judge Cunningham never met JU by having her testify at a hearing. Rather, she assessed her credibility based on a police report, and relying on a report of JU's initial "denial" of abuse, which is of little value in child sexual-abuse cases.[59]

This decision is in conflict with the mandate of MCL 768.27a that "evidence that the defendant committed another listed offense against a minor **is admissible**

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[56] *Id*., at 642, n 22; *quoting US v Sanchez*, 969 F2d 1409, 1414 (CA2 1992); *other citations omitted*.
[57] *Lemmon*, *supra* 54, at 643-644; citations omitted.
[58] *People v Jones*, 301 Mich App 566, 573-574; 837 NW2d 7 (2013); *citations omitted*.
[59] *Uribe*, *supra* 13, at 6 n 18.

and **may be considered** for its bearing on any matter that is relevant."[60]

Conclusion

While *Watkins* permits a trial judge to asses offered evidence for reliability, it does not grant the trial judge the ability to sit as a juror and make credibility determinations. Judge Cunningham's determination that JU lacked credibility, is contrary to the statute's mandate that child-sexual-propensity evidence **is** admissible, and permitted to bolster the credibility of a child-victim. Rather, if the trial judge was permitted to make such a determination, under the excuse of "unreliable evidence," this analysis would deny the jury of the information needed to make an informed decision.[61]

The Court of Appeals' determination that Judge Cunningham improperly made a credibility determination, in conflict of established law, was not clearly erroneous. And that decision does not conflict with this Court's decision in *Watkins*.

Conclusion

Since the Court of Appeals decision, ordering the admission of JU's testimony, was neither a clear error, nor in conflict with this court's decision in *Watkins* – Uribe's application for leave to appeal must be DENIED.

Respectfully submitted,

Brent E. Morton

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September 24, 2015

Brent E. Morton

[60] MCL 768.27a; *emphasis added*.
[61] *People v Aldrich*, 246 Mich App 101, 115; 631 NW2d 67 (2001).